

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

Petition of the Independent Payphone)
Association of New York, Inc. to Pre-)
empt Determinations of the State of)
New York Refusing to Implement the)
Commission's Payphone Orders, and)
For a Declaratory Ruling)

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON THE PETITION OF THE
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.,
FOR AN ORDER OF PREEMPTION AND DECLARATORY RULING**

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January 18, 2005

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The American Public Communications Council ("APCC") hereby supports the Independent Payphone Association of New York, Inc.'s ("IPANY's") request for an order of preemption and declaratory ruling (1) that the Commission's rulings in the *Wisconsin Public Service Commission* proceeding¹ provide a definitive, generally

¹ *Wisconsin Public Service Commission, Order Directing Filings*, Order, 15 FCC Rcd 9978 (Com. Car. Bur. 2000) ("NST Designation Order"), *aff'd in part and modified in part*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("NST Review Order"), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 524 U.S. 2065 (2004) (collectively, the "NST Orders").

applicable interpretation of the Commission's *Payphone Orders*² and new services test ("NST") that must be applied by all states, including New York; (2) that, to be consistent with the *Payphone Orders* and *NST Orders*, New York must require Verizon to provide refunds to New York payphone service providers ("PSPs"), back to April 15, 1997, to the extent that Verizon's NST-compliant payphone line rates, when finally established, are less than the pre-existing rates; and (3) that the inconsistent determinations by the New York public service commission and court are preempted.³

I. THE COMMISSION'S NST RULINGS ARE DEFINITIVE, GENERALLY APPLICABLE INTERPRETATIONS OF EXISTING FEDERAL LAW AND MUST BE APPLIED BY ALL THE STATES

As argued by IPANY, and contrary to the rulings of the New York PSC and courts, this Commission's *NST Orders* are definitive, generally applicable interpretations of existing law. Therefore, those rulings (1) must be applied in New York the same as in other states attempting to review payphone line rates under the federal NST standard, and (2) like any other definitive interpretation of existing law, are

² *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in part and rev'd in part*, Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, Virginia State Corp. Comm'n v. FCC, 523 U.S. 1046 (1998); Order, 12 FCC Rcd 20997 (CCB 1997) ("*First Waiver Order*"); Order, 12 FCC Rcd 21370 (CCB 1997) ("*Second Waiver Order*") (collectively, the "*Payphone Orders*").

³ Petition of the Independent Payphone Association of New York, Inc., for an Order of Preemption and Declaratory Ruling, filed December 29, 2004, at 3-4 ("IPANY Petition").

applicable to pending state proceedings regardless of when commenced or when the state authority made its initial ruling.

It is -- or should be -- beyond dispute that the Commission's rulings on general legal questions in the *NST Orders* are applicable not only in Wisconsin but in all states. The issues in the state NST proceedings concern the correct application of a federal ratemaking test with which the Commission's own rules and orders require incumbent local exchange carriers ("LECs") to comply. The Commission is, of course, the most reliable interpreter of its own rules and orders.⁴ State proceedings therefore, must apply the FCC's orders explicating and interpreting the NST. In fact the *NST Orders* made it crystal clear that its rulings on generally applicable legal issues that arose in the Wisconsin context were intended to provide guidance to all state public service commissions facing the same or similar issues. *NST Review Order* at 2052 ¶¶ 2 ("we believe that this Order will assist states in applying the new services test to BOCs' intrastate payphone line rates"), 43. Indeed, after issuing the *NST Review Order*, the Commission issued a second order directing three state commissions (who were the subject of petitions requesting review of state decisions by this Commission) to conduct their NST proceedings in accordance with the *NST Review Order*. See *North Carolina Payphone Association Petition for Declaratory Ruling*, CCB/CPD 99-27, Order, DA 02-513 (released March 5, 2002).

⁴ It is commonly held that even *federal* courts owe extraordinary deference to an agency's interpretation of its own rules. *Capital Network System, Inc. v. F.C.C.*, 28 F.3d 201, 206 (D.C. Cir. 1994) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). The degree of deference owed by *state* courts and agencies, which have no authority to review federal agency determinations of federal law, must be even greater, if that is possible.

It is also indisputable the *NST Orders* did not make “new law.” As the Commission expressly stated in the *NST Orders*, those orders did not amend the Commission’s rules – they merely interpreted the Commission’s 1996 rulemaking decision requiring application of the NST to payphone line rates and the Commission’s other prior decisions applying the NST in various contexts. *NST Review Order* at 2065-71. For example, the Commission ruled in the *NST Review Order* that the NST required the use of forward-looking costs, not embedded costs. *Id.* at 2065 ¶43. In so ruling, the Commission applied “longstanding precedent” requiring the use of forward-looking cost methodologies in applications of the NST. *Id.* The requirement to use forward-looking costs thus predated the *NST Order* and predated the inconsistent New York public service commission order approving the use of embedded costs.

II. TO BE CONSISTENT WITH THE COMMISSION’S PAYPHONE ORDERS, VERIZON MUST BE REQUIRED TO PROVIDE REFUNDS TO NEW YORK PSPs

As argued by IPANY, and contrary to the rulings of the New York public service commission and court, the only valid application of the *Payphone Orders* and *NST Orders* to New York is to require Verizon to provide refunds to New York payphone service providers (“PSPs”), back to April 15, 1997, to the extent that Verizon’s NST-compliant payphone line rates, when finally established, are less than the pre-existing rates. This issue is essentially the same as that raised by the petition of the Illinois Public Telecommunications Association (“IPTA”), on which APCC previously filed comments.⁵ We will not repeat all the arguments in the APCC IPTA Comments and

⁵ See Public Notice, DA 04-2487 (rel. August 6, 2004); Comments of the American Public Communications Council on the Illinois Public Telecommunications Association’s Petition for Declaratory Ruling (filed August 26, 2004)(“APCC IPTA

APCC IPTA Reply Comments, which are generally applicable to IPANY's petition. APCC hereby incorporates by reference into these Comments it's the APCC IPTA Comments and APCC IPTA Reply Comments.

As explained in APCC's IPTA Comments, a Commission ruling on the refund issue is urgently needed to end regulatory uncertainty⁶ and to redress longstanding inequity to PSPs and their customers. Verizon and other Bell Companies have exploited the Commission's processes by first agreeing to bring their payphone line rates into compliance with the new services test so that their payphones become eligible to receive dial-around compensation, and then delaying compliance as long as possible by obstinately maintaining, even in the face of clearcut FCC guidance, that their rates complied with the new services test. The Bell Companies even challenged this Commission's jurisdiction to order the Bell Companies to comply with the new services test, even though three years earlier the Bell Companies had promised to comply in order to gain a huge regulatory benefit – eligibility to collect payphone compensation for their own payphones.

As a result, the BOCs have reaped huge economic gains to which they were not entitled, and have unfairly deprived PSPs and their customers of the benefits of cost-

(Footnote continued)

Comments"); Reply Comments of the American Public Communications Council on the Illinois Public Telecommunications Association's Petition for Declaratory Ruling (filed September 7, 2004) ("APCC IPTA Reply Comments").

⁶ See *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Dkt. No. 03-211, FCC 04-267 ¶14 n. 46 (rel. November 12, 2004)(finding it "essential that we take action to bring some greater measure of certainty to the industry [and] to enable this Commission and the states . . . to address the numerous other unresolved issues").

based rates, to which PSPs *were* entitled. Allowing the BOCs to keep the excess payphone line charges in the face of their promise to refund those charges would undermine the integrity of the Commission's processes and reward the BOCs for their persistent refusal to comply with the *Payphone Orders*. Requiring refunds, on the other hand, will defend the integrity of the Commission's processes, make PSPs whole for their losses, and promote the widespread payphone deployment mandate of the Telecommunications Act.

There can be no dispute that, as IPANY argues, (1) the *Payphone Orders* required the BOCs to comply with the NST in order to be eligible to collect dial-around compensation for their own payphones beginning April 15, 1997, (2) Verizon failed to timely comply with the NST in New York as well as numerous other states, and (3) in return for a temporary waiver that allowed it to become eligible for payphone compensation as of April 15, 1997, Verizon promised that:

Where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

See Letter from Michael K. Kellogg to Mary Beth Richards at 1 (April 11, 1997) ("*Second Kellogg Letter*"). As IPANY explains in its IPANY petition, the argument that this agreement did not apply to Verizon in New York because Verizon only proposed to revise some of its rates, is not only perverse,⁷ but fallacious. The key determinant of

⁷ Even if Verizon did not "rely on" the FCC's waiver, that does not change the fact that Verizon violated the FCC's *Payphone Orders* by collecting dial-around compensation without complying with the new services test. As explained by IPANY, to remedy that violation there are only two alternatives: disgorge the benefits gained by non-compliance with the new services test, or disgorge the illegally collected dial-around compensation. The amount of dial-around compensation collected by Verizon

whether the *Second Waiver Order* applies is not whether Verizon *voluntarily* reduced any particular rate, but whether “new or revised tariffs are *required*.” *Second Kellogg Letter* at 1 (emphasis added).

The purpose of the *Second Waiver Order* was to enable BOCs whose rates might or might not be in compliance by April 15, 1997, to cover themselves against the possibility of non-compliance by taking additional time to review their line rates and making a compliance filing by May 19, 1997. In that filing, the BOC could raise its rates, lower its rates, or file a cost justification to show that the existing rates already complied; whatever the BOC filed, the BOC would qualify for the waiver. The FCC’s order required BOCs to refund excess charges “if newly tariffed rates, *when effective*, are lower than the existing rates.” *Second Waiver Order* ¶ 20 (emphasis added). Thus, it is irrelevant whether the rate *filed* by the BOC, or asserted to be new-services-test compliant, was lower than the existing rate. Refunds are required if the rate that actually *became effective* after review by the state public service commission⁸ in accordance with the correct standard was lower than the existing rate.⁹ The logical and

(Footnote continued)

and other BOCs from interexchange carriers since April 15, 1997, far exceeds the amount of line charges improperly collected from PSPs. By arguing that it should not have to refund the excess line charges, Verizon perversely subjects itself to the alternative and far more onerous remedy.

⁸ The “when effective” language also refutes the notion, accepted by the New York commission, that Verizon’s commitment to refund excess charges was limited to charges assessed prior to Verizon’s May 19, 1997 compliance filing. The refund period expressly extended to the time “when” NST-compliant rates became “effective.”

⁹ In most if not all states, BOCs elected to make compliance filings on May 19, 1997. Whether or not they proposed rate reductions, these filings typically made reference to the *Second Waiver Order* and gave every indication that they were filed

legal remedy for these violations of law is to require the BOCs to refund all charges they have collected since April 15, 1997 in excess of new-services-test-compliant rates. A refund of payphone line charges is clearly preferable to the only alternative – requiring the BOCs to disgorge all dial-around compensation collected while the BOCs were ineligible.

III. THE COMMISSION SHOULD DECLARE THAT THE INCONSISTENT RULINGS OF THE NEW YORK COMMISSION AND COURTS ARE PREEMPTED

For the reasons explained above, in the IPANY petition, and in APCC's comments on the IPTA and SPCA petitions, the rulings of the New York public service commission and courts that incorrectly characterize the NST and that deny refunds to New York PSPs are inconsistent with this Commission's *Payphone Orders*. Section 276(c) explicitly states that state regulations that are inconsistent with the Commission's regulations are preempted. 47 U.S.C. §276(c). Therefore, the Commission should issue a ruling stating that the inconsistent New York decisions are preempted.

(Footnote continued)

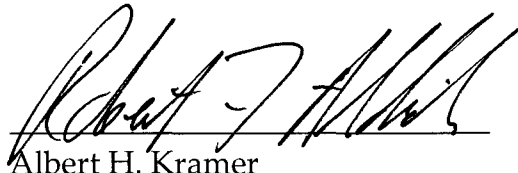
pursuant to that order. It would be utterly irrational to conclude that BOCs who made compliance filings on May 19, 1997, to justify their existing rates were choosing to "roll the dice" on their eligibility for compensation rather than to safeguard that eligibility.

CONCLUSION

For the foregoing reasons, the Commission should grant IPANY's petition for a declaratory ruling and rule that (1) the NST Orders are applicable to Verizon's payphone line rates in New York, and (2) Verizon must provide refunds back to April 15, 1997 for all payphone line charges collected from PSPs in excess of new-services-test-compliant rates.

Dated: January 18, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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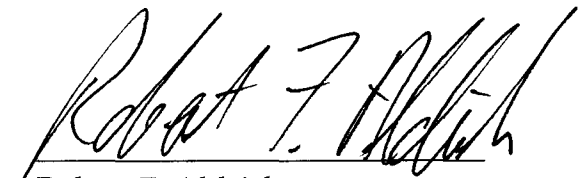
CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2005, the foregoing Comments of the American Public Communications Council on the Independent Payphone Association of New York's Petition was delivered via first-class U.S. Mail, postage pre-paid to the following:

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